TOMMY THOMAS

v.

PEGUAM NEGARA, MALAYSIA & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-01-03-1999]
23 APRIL 2001

CIVIL PROCEDURE: *Contempt of court - Breach of undertaking - Appellant issued press statement in breach of undertaking given in High Court - Whether High Court had jurisdiction suo moto to punish appellant for contempt - Whether High Court could move on its own motion - Whether High Court's sentence of six months' imprisonment excessive - Rules of the High Court 1980, O. 52 r. 4*

The appellant was a co-defendant in three libel actions brought against him and Ms Skrine & Co, the law firm of which he was a partner at the material time. The actions were brought by three different plaintiffs in respect of an article attributed by the appellant and published in a foreign magazine. The said article was critical of the Malaysian judiciary and suggested impropriety on the part of the said plaintiffs. Subsequently, there was a compromise and a statement was read out in open court for each of the defendants in the actions which was in effect an apology and an undertaking not to repeat or publish the defamatory words or any similar words that the appellant had attributed to in the said article. On the evening of the day the open court statement was read out, the appellant issued a press statement alleging that he had not wanted to compromise but that his insurers had taken the matter out of his hands. That was published the very next day in the newspapers. However, on the same day as the publication of the report, after realising the seriousness of what he had done, the appellant issued another statement retracting his earlier press statement. Nevertheless, the High Court issued a notice to the appellant to show cause on why he should not be punished for contempt of court. The appellant duly appeared on the notice and pleaded guilty whilst apologising for what he had done. The learned judge found him guilty and sentenced him to six months' imprisonment. Hence, the present appeal.

Held:

Per Gopal Sri Ram JCA (dissenting)

[1] The High Court has jurisdiction *suo motu* to punish for contempt of which it takes cognisance. But the jurisdiction is exercisable only in urgent cases where it is imperative for the court to act at once. Such cases are limited instances where there is gross interference with the course of justice in respect of a case tried, that is under way or has just been concluded. In all other cases, the court should leave it to a party or to the Attorney General to institute contempt proceedings in the ordinary way.

[2] The appellant's repudiation of the open court statement certainly made a mockery of the abject apology that had been tendered in court earlier on the same day. It put the integrity of the open court statement in jeopardy. It was a serious contempt of court. But the appellant had not scandalised the court. His repudiatory conduct did not bring the court into odium. It did not lower the court's dignity in anyway. It did not immediately threaten the administration of justice. The only people who were directly affected by the appellant's unwise conduct were the plaintiffs in the libel actions. They could take the appropriate steps against the appellant. If they were not interested in the matter, then it would be open to the Attorney General as guardian of the public interest to take action.

[3] If the judge was entitled to have moved on his own motion against the appellant, he ought to have terminated the proceedings before him on the notice to show cause, once he was advised of a pending application for leave to apply for committal. He should thereafter have left it to the particular plaintiff to proceed with his action for committal.

[4] The facts of the present case did not fall within the "urgent and imperative" rule as laid down by Lord Denning MR in *Balogh v. St. Albans Crown Court* and by Raja Azlan Shah in *Karam Singh v. Public Prosecutor*. Therefore, given that the court had the necessary jurisdiction and power, the appellant's case was not an appropriate case for the application of the summary jurisdiction.

[5] The appellant had done wrong but he had apologised for it and begged for mercy. There was no judicial appreciation by the learned judge of the apology tendered by the appellant. The judge therefore erred in imposing a term of imprisonment of six months. It was manifestly excessive.

Per Denis Ong JCA (majority)

[1] The High Court has the summary powers to punish for contempt in light of the saving provisions of O. 52 r. 4 Rules of the High Court 1980.

[2] Contempt may be committed in the face of the court as well as outside the court and in those situations it is equally important that the dignity and integrity of the court be protected and preserved. The breach in question here took place after the conclusion of the settlement proceedings by the act and conduct of the appellant in issuing the press statement to the media which had the effect of undermining public confidence in the dignity and integrity of the High Court. Thus, the contempt committed was not in the face of the court during the proceeding (which if it were so, would be dealt with summarily on the spot) but was committed outside the court. In the latter situation it is also required to deal with the contempt urgently by way of summary procedure in the form of motion by the private party, the Attorney General or the court so that the true position be made publicly known and that any mischief caused by the press statement should be promptly remedied so far as is possible.

[3] Lack of urgency is, however, no more than a factor which should weigh with the court and it is not possible to lay down any hard and fast rule. In the present case, publication in the media took place on 21 October 1998. No contempt proceeding was initiated by the Attorney General or the relevant parties. Only nine days thereafter did the High Court issue the notice to show cause which was heard on 30 November 1998, *ie*, thirty-nine days after publication to the media. If the High Court had waited for the respondents to proceed with the committal, that would surely have resulted in further delay.

[4] There was no argument heard or a determination made by the High Court judge on the recusal point because there was no application made to the learned judge to recuse himself. Further, the stand taken by the appellant in the High Court was not to oppose the notice but to offer an explanation in mitigation of the sentence. It was not proper for the appellant to alter that stand that was taken in the High Court after it was acted upon by the High Court judge and the other parties to the proceedings.

[4a] There are two ways of looking at the High Court judge continuing with the hearing of the notice: one is from the inside, *ie*, from the perspective of the judiciary and the other is from the outside, *ie*, from the prospective of the community and there are arguments for and

against his continuation. For those reasons, the High Court was right to have issued *suo motu* in the particular circumstances of the case and for the same judge to continue to hear the committal proceedings to its conclusion. Therefore, the conviction of the appellant by the High Court should be upheld.

[5] The appellant retracted his press statement which was published the next day. He had pleaded guilty to the charge in the sense that he did not oppose the notice to show cause and chose only to mitigate in sentence. Lastly, he did in fact repeatedly apologise to the High Court and pleaded for mercy.

Per Ahmad Fairuz JCA (majority)

[1] The alleged contempt was taken cognisance of by the High Court some nine days after the alleged offence was committed. Hence, the High Court's action was not immediate. Further, neither the Attorney General nor the respondents took any steps to bring committal proceedings against the appellant. Under the circumstances, the High Court had taken the right steps in issuing the notice to show cause.

[2] From the case laws, it is evident that the summary remedy is available in cases of breaches of undertakings to the court. Further, O. 52 r. 4 of the Rules of the High Court 1980 clearly empowers the High Court to act on its own motion.

[3] The facts showed beyond reasonable doubt that the appellant had committed the contempt offence. The appellant was not prejudiced just because the learned judge did not comply with the "urgent and imperative rule" before summary power could be exercised as laid down in both *Balogh*'s and *Karam Singh*'s cases. To quash his conviction merely on the ground that the High Court should have left the matter to be taken up by the Attorney General or the respondents would be an injustice. Also, it was an injustice to acquit a person who had not only pleaded guilty to the charge preferred against him but had clearly committed the contempt of court offence beyond reasonable doubt.

[Appeal against conviction dismissed by a majority; appeal against sentence allowed to the extent of substituting six months' imprisonment with a fine of RM10,000, in default thereof three months' imprisonment.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu adalah defendan sertaan di dalam tiga saman fitnah yang dibawa terhadapnya dan tetuan Skrine & Co, sebuah firma guaman di mana perayu juga merupakan salah seorang rakan kongsi pada masa itu. Tindakan tersebut telah dibawa oleh tiga plaintif yang berbeza berkaitan dengan satu artikel perayu yang diterbitkan dalam sebuah majalah asing. Artikel tersebut telah mengkritik badan kehakiman Malaysia dan membayangkan kelakuan salah plaintif-plaintif tersebut.

Kemudian daripada itu, terdapat suatu kompromi dan sesuatu kenyataan berkaitan dengan kompromi tersebut telah dibaca dalam mahkamah terbuka bagi setiap defendan dalam tindakan tersebut dengan memohon maaf dan memberikan akujanji tidak akan mengulangi atau menerbitkan perkataan yang memalukan serta menerbitkan apa-apa perkataan yang memalukan serta lain-lain perkataan yang sama maknanya dengan perkataan-perkataan perayu dalam artikel tersebut.

Pada petang di mana kenyataan itu dibacakan dalam mahkamah terbuka, perayu telah mengeluarkan kenyataan akhbar menyatakan bahawa beliau sememangnya tidak mahu bertolak ansur terhadap perkara itu tetapi pihak insuransnya yang telah berbuat demikian. Kenyataannya itu telah diterbitkan di dalam akhbar pada keesokkan harinya. Pada hari yang sama, apabila kenyataannya itu dilapurkan, setelah menyedari kesilapan yang telah dilakukan, perayu telah mengeluarkan satu lagi kenyataan untuk menarik balik kenyataan akhbar yang terdahulu. Walaubagaimanapun Mahkamah Tinggi telah mengeluarkan satu surat tunjuk sebab mengapa perayu tidak boleh dikenakan tindakan penghinaan mahkamah atas kenyataannya itu. Perayu telah hadir untuk notis itu dan mengakui kesalahannya dan memohon maaf atas perbuatannya. Hakim yang bijaksana telah mendapati beliau bersalah dan menjatuhkan hukuman enam bulan penjara. Maka, rayuan ini.

Diputuskan:
Oleh Gopal Sri Ram HMR (bertentangan)

[1] Mahkamah Tinggi mempunyai bidangkuasa *suo motu* untuk menghukum dalam kesalahan penghinaan mahkamah. Namun bidangkuasa itu digunakan hanya dalam keadaan di mana jika ianya benar-benar memaksa mahkamah bertindak berbuat demikian. Keadaan sedemikian adalah terhad di mana terdapat campurtangan yang besar dalam bidang kehakiman dalam satu-satu kes yang sedang atau baru dibicarakan. Dalam kes-kes yang lain, mahkamah sepatutnya membiarkan sesuatu pihak atau Peguam Negara untuk memulakan tindakan penghinaan mahkamah dalam keadaan yang biasa.

[2] Penyangkalan perayu mengenai kenyataan dalam mahkamah terbuka telah mencemuhkan kemaafan yang diberikan di mahkamah pada hari yang sama. Ia meletakkan keluhuran kenyataan dalam mahkamah yang terbuka dalam keadaan bahaya. Ini merupakan penghinaan mahkamah yang serius. Tetapi perayu tidak melanggar kesopanan terhadap mahkamah. Tindakan penyangkalnya tidak membawa sebarang kecacatan kepada mahkamah. Ia tidak merendahkan martabat mahkamah dalam apa cara sekali pun. Ia tidak mengancam pentadbiran bidang kehakiman. Orang yang merasakan kesan secara terus dalam tindakan kurang bijak perayu adalah plaintif-plaintif dalam tindakan fitnah itu. Mereka boleh mengambil langkah-langkah yang wajar terhadap perayu. Sekiranya mereka tidak berminat dalam perkara itu, maka terpulanglah kepada Peguam Negara selaku penjaga kepentingan awam untuk mengambil tindakan.

[3] Sekiranya hakim tersebut berhak memulakan usulnya bertindak ke atas perayu, beliau seharusnya membatalkan prosiding yang sedang didengarnya dalam notis tunjuk sebab apabila ia diberitahu tentang permohonan bagi kebenaran untuk perintah komital yang sedang dipohon. Beliau sepatutnya membiarkan plaintif tersebut meneruskan tindakan permohonan tersebut.

[4] Fakta-fakta dalam kes ini tidak menunjukkan sebarang prinsip di mana keadaan yang terdesak dan perlu ("urgent and imperative") sepertimana yang dinyatakan oleh Lord Denning MR dalam kes *Balogh lwn. St Albans Crown Court* dan oleh Raja Azlan Shah dalam kes *Karam Singh lwn. PP*. Oleh yang demikian, walaupun mahkamah mempunyai kuasa tersebut, kes perayu ini bukanlah satu kes yang memerlukan suatu permohonan untuk kuasa tersebut dilaksanakan.

[5] Perayu telah melakukan kesilapan tetapi telah memohon maaf dan ia merayu belas kasihan mahkamah. Hakim yang bijaksana tidak menghargai kemaafan yang diberikan oleh perayu. Oleh itu hakim tersebut telah terkhilaf dengan menyatakan hukuman penjara enam bulan tersebut. Ianya jelas keterlaluan.

Oleh Denis Ong HMR (majoriti)

[1] Mahkamah mempunyai kuasa untuk menghukum dalam kes penghinaan mahkamah seperti yang termaktub dalam A. 52 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980.

[2] Penghinaan mahkamah mungkin berlaku di dalam dan di luar mahkamah dan dalam keadaan sedemikian adalah sangat penting bahawa martabat dan keluhuran mahkamah dijaga dan sentiasa dipandang tinggi. Perpecahan prinsip tersebut berlaku selepas kesudahan prosiding penyelesaian dengan tindakan perayu mengeluarkan satu kenyataan akhbar yang memberikan kesan mendalam terhadap masyarakat terhadap keyakinan, keluhuran dan martabat Mahkamah Tinggi. Penghinaan mahkamah tidak berlaku di dalam mahkamah sewaktu perbicaraan sedang berjalan (sekiranya berlaku sekali pun, ianya akan diadili pada masa itu juga) tetapi ia berlaku di luar mahkamah. Dalam keadaan di mana penghinaan mahkamah berlaku di luar mahkamah, ia hendaklah diadili dengan segera melalui satu prosiding yang segera dalam satu usul oleh satu pihak iaitu Peguam Negara atau mahkamah itu sendiri supaya orang awam mengetahui keadaan sebenarnya dan sebarang salahlaku yang dibuat melalui kenyataan akhbar boleh diperbetulkan dengan secepat mungkin.

[3] Tiada tindakan segera, bagaimanapun, adalah tidak lebih daripada satu faktor yang mahkamah mesti mengambil berat dan tidak mungkin untuk meletakkan suatu peraturan yang tetap. Dalam kes ini, lapuran dalam media tempatan berlaku pada 21 Oktober 1998. Tidak ada prosiding penghinaan mahkamah dimulakan oleh Peguam Negara atau mana-mana pihak yang berkaitan. Hanya selepas sembilan hari selepas itu, Mahkamah Tinggi mengeluarkan satu notis tunjuk sebab yang telah didengar pada 30 November 1998, iaitu tiga puluh sembilan (39) hari selepas lapuran dalam media. Sekiranya mahkamah menunggu penentang-penentang memulakan tindakan komital, itu sememangnya akan melambatkan keadaan.

[4] Tidak ada penghujahan yang telah didengar atau sebarang keputusan yang dibuat oleh hakim Mahkamah Tinggi mengenai fakta 'recusal' kerana tidak ada sebarang permohonan yang dipohon kepada hakim yang bijaksana untuk 'recuse' beliau. Lagi, kedudukan yang diambil oleh perayu di Mahkamah Tinggi bukan untuk menentang notis sebab itu tetapi menawarkan penjelasan bagi mengurangkan hukumannya. Perayu tidak patut mengubah kedudukan tersebut setelah hakim Mahkamah Tinggi dan pihak-pihak berkaitan bertindak atasnya.

[4a] Terdapat dua cara untuk melihat bagaimana hakim mahkamah tersebut terus mendengar notis tersebut. Satu cara adalah dari dalam iaitu daripada perspektif badan kehakiman dan satu cara lagi adalah dari luar iaitu daripada perspektif masyarakat dan terdapat penghujahan untuk dan menentang hakim terus mendengarnya. Dengan itu, Mahkamah Tinggi

adalah betul apabila mengeluarkan *suo motu* dalam keadaan kes tersebut dan untuk hakim yang sama untuk terus mendengar prosiding komital itu. Oleh itu, sabitan perayu oleh Mahkamah Tinggi patut disokong.

[5] Perayu telah menarik kembali kenyataan akhbarnya itu yang dilapurkan pada keesokkan harinya. Beliau telah mengaku salah atas tuduhan tersebut dengan tidak menentang notis tunjuk sebab dan merayu untuk mengurangkan hukumannya. Akhirnya beliau telah memohon kemaafan berkali-kali kepada mahkamah dan memohon belas kasihan daripada mahkamah tersebut.

Oleh Ahmad Fairuz HMR (majoriti)

[1] Tuduhan penghinaan mahkamah telah berlaku di Mahkamah Tinggi sembilan hari selepas kesalahan tersebut dilakukan. Oleh itu tindakan Mahkamah Tinggi bukan satu tindakan yang segera. Seterusnya, Peguam Negara mahupun penentang-penentang tidak mengambil sebarang langkah untuk memulakan prosiding komital terhadap perayu. Dalam keadaan itu, Mahkamah Tinggi telah mengambil langkah yang betul dalam mengeluarkan satu notis tunjuk sebab.

[2] Daripada kes undang-undang, ianya jelas bahawa remedi terus sedia ada bagi kes-kes perpecahan akujanji terhadap mahkamah. Seterusnya, A. 52 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 jelas memberikan kuasa terhadap Mahkamah Tinggi bagi bertindak untuk memulakan usulnya.

[3] Fakta-fakta menunjukkan terdapat kes di luar keraguan munasabah bahawa perayu telah melakukan kesalahan penghinaan mahkamah. Perayu tidak diprejudiskan hanya semata-mata kerana hakim yang bijaksana tidak mematuhi prinsip "urgent & imperative" sebelum menggunakan kuasa terus seperti yang dinyatakan dalam kes *Balogh* dan *Karam Singh.* Untuk membatalkan hukuman perayu atas dasar bahawa Mahkamah Tinggi sepatutnya membiarkan Peguam Negara atau penentang-penentang memulakan tindakan itu adalah satu perkara yang tidak adil. Juga adalah tidak adil untuk membebaskan seseorang yang telah bukan sahaja mengaku salah atas tuduhannya tetapi jelas di luar keraguan munasabah melakukan kesalahan penghinaan mahkamah.

[Rayuan terhadap kesalahan ditolak oleh majority; rayuan terhadap hukuman diterima tetapi setakat menggantikan penjara enam bulan dengan denda RM10,000, jika gagal membayar akan dipenjara tiga bulan.]

Case(s) referred to:

A-G v. Butterworth & Ors [1963] 1 QB 696 ***(refd)***
Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors [1986] 2 CLJ 109 ***(foll)***
Balogh v. St Albans Crown Court [1975] QB 73 ***(dist)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***
Clarke v. Chadburn [1985] 1 All ER 211 ***(refd)***
Coward v. Stapleton (90) CLR 573 ***(refd)***
Dinabandhu Sahu v. State of Orissa AIR [1972] SC 180 ***(foll)***
Imtiaz Ahmad v. Ghulam Ali PLD [1963] SC 382 ***(refd)***
In re M (a Minor) [1999] 2 WLR 810 ***(refd)***
Karam Singh v. PP [1975] 1 MLJ 229 ***(refd)***
Karam Singh Veriah v. Karpal Singh [1987] 1 CLJ 63 ***(refd)***
Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor [1997] 3 CLJ 197 ***(dist)***
Manokaran & Anor v. PP [1979] 1 MLJ 262 ***(refd)***
Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 ***(refd)***
R v. Hill [1986] Crim LR 457 ***(refd)***
Re Coles and Ravenshear [1907] 1 KB 1 ***(refd)***
Skrine & Co v. MBf Capital Bhd & Anor [1998] 3 CLJ 432 ***(refd)***
Solicitor-General v. Radio Avon Ltd [1978] 1 NZLR 225 ***(refd)***
Witham v. Holloway 131 ALR 401 ***(refd)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 ***(refd)***

Legislation referred to:

Penal Code, s. 170
Rules of the High Court 1980, O. 52 r. 4, O. 78 r. 5(2)

Rules of the Supreme Court 1965 [UK], O. 52 r. 4

Other source(s) referred to:

Borrie & Lowe, *The Law of Contempt*, 3rd edn, pp 502-503
Supreme Court Practice, 1979 1, para 52/51/1

Civil Appeal No: W-01-03-1999
For the appellant - Cecil Abraham (Darryl Goon, Gurmeet Kaur Sidhu, Raja Eileen Suraya with him); M/s Raja, Darryl & Loh
For the respondent - Dato' Zaitun Zawiyah Puteh A-G

Civil Appeal No: W-01-10-1999
For the appellant - Cecil Abraham (Darryl Goon, Gurmeet Kaur Sidhu, Raja Eileen Suraya with him); M/s Raja, Darryl & Loh
For the 1st respondent - Dato' Zaitun Zawiyah Puteh A-G
For the 2nd & 3rd respondents - Dato' Sivaparanjothi (R Thayalan with him); M/s V Siva & Partners

Civil Appeal No: W-02-46-1999
For the appellant - Cecil Abraham (Darryl Goon, Gurmeet Kaur Sidhu, Raja Eileen Suraya with him); M/s Raja, Darryl & Loh
For the respondents - Dato' Sivaparanjothi (R Thayalan with him); M/s V Siva & Partners

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

The Background

The appellant, Tommy Thomas, is an advocate and solicitor. But he is not before us in that capacity. He is here in his capacity as an ordinary litigant. He has been convicted of the offence of contempt of court and sentenced to six months imprisonment. The circumstances leading up to his conviction may be shortly stated.

The appellant was a co-defendant in three libel actions brought against him and M/s Skrine & Co, the firm of which he was a partner at the material time. The actions were brought by three different plaintiffs in respect of an article published in a foreign magazine. The article was extremely critical of the Malaysian judiciary. It suggested that the plaintiffs in the three actions had been guilty of impropriety in respect of certain suits that had been instituted in our courts. Some of the background to the libel actions may be found in the judgment of this court in *Skrine & Co v. MBf Capital Bhd & Anor* [1998] 3 CLJ 432.

The libel actions in which the appellant was a defendant were later compromised. The parties settled a statement in accordance with the provisions of RHC O. 78 r. 5(2). On 21 October 1998, counsel for the parties appeared before the learned judge in open court. The statement was read out. It contained a statement by counsel for each of the defendants in the actions. It also contained a statement by the appellant's counsel. This is what it said:

> On behalf of the Defendant Mr. Tommy Thomas I associate myself with everything my learned friend has said.
>
> Mr. Tommy Thomas is anxious through me to convey to the Plaintiffs and each of them his profound regrets for the contributions which Mr Tommy Thomas made to this article by speaking to the journalist in advance of his writing it. Mr Tommy Thomas unreservedly accepts that none of the Plaintiffs was guilty of the procurement of special favours or of any

impropriety whatsoever in the litigation described in the article. He unreservedly apologises to the Plaintiffs and each of them for his remarks in the article. Mr Tommy Thomas confirms that it was not his intention to accuse any of the Plaintiffs of having been guilty of any impropriety.

Mr. Tommy Thomas also hereby gives an undertaking to Dato' V Kanagalingam, Tan Sri Dato Vincent Tan Chee Yioun, Berjaya Industrial Berhad, Berjaya Corporation (Cayman) Ltd, MBf Capital Berhad MBf Northern Securities Sdn Bhd, Insas Berhad and Megapolitan Nominees Sdn Bhd that he will not repeat or publish the said or any similar words attributed to him in the article.

One would have thought that that would have been the end of the matter. It was not to be. That is because the appellant was unhappy with the settlement that had been arrived at. It appears that he had not wanted to settle. But the insurers had taken the matter out of his hands. This is perfectly normal practice in cases where a member of the legal profession has taken out a policy of indemnity insurance. The insurers are therefore the ultimate paymasters. So, they are entitled to call the tune. The appellant must have been aware of this.

The ink on the paper had hardly dried when the appellant acted. He issued a press statement on the very evening of the day on which the open court statement had been read. It was carried in the newspapers the very next day, along with the story about the settlement. There is no dispute about what he said. The relevant part of the report reads as follows:

Later in the evening, in a statement, Thomas said: 'The settlement of the defamation actions was initiated, brokered and insisted upon entirely by the insurers. The actions were settled despite my express objections.'

It does not take much intellectual exercise to realise the effect of this statement. It was a material departure from the open court statement that had been read out on the appellant's behalf only a few hours earlier. It meant that there had been no sincere apology as represented in the open court statement. It meant that the court had been misled about the apology. Either the appellant had misled the court or his counsel had. It was a very serious infraction of the law.

Almost at once, the appellant realised the seriousness of what he had done. On the same day as the publication of the report, he issued another statement. He retracted his earlier press statement. The retraction was published on the following day, that is, 23 October 1998.

On 31 October the High Court issued a notice to the appellant to appear before the learned judge to show cause why he should not be punished for contempt of court. The notice to show cause was accompanied by an annexure which set out the charge and the material facts on which it was based. The charge was that that the appellant had breached the undertaking that he had given to the court in the open court statement. In the meantime, one of the parties to the libel action had filed an application to commit the appellant for contempt.

The appellant duly appeared on the notice. He filed an affidavit. He also gave oral evidence. He did not contest the accuracy of the charge in the notice. He pleaded guilty. He apologised for what he had done. He explained why he had done what he did. But, the judge was not impressed. He found the appellant guilty and passed sentence.

The Issues

The arguments addressed to us on the appeal raise three issues. First, whether the court had jurisdiction to act. If it did, then, second, whether this was an appropriate case in which to exercise the jurisdiction. Third, whether the sentence passed on him is manifestly excessive.

First Issue: Was There Jurisdiction?

Now, although the appellant pleaded guilty to the charge in the court below, in his memorandum of appeal he put in issue the correctness of the learned judge's act of issuing the notice to show cause. This at once raises the question whether the judge had jurisdiction to do what he did. It is trite law that the jurisdiction of a court may be challenged for the first time on appeal even if it was not raised in the court below. In civil appeals the point is concluded by the authority of *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9. In criminal cases the point is concluded by the decision in *Manokaran & Anor. v. Public Prosecutor* [1979] 1 MLJ 262, where Abdoolcader J, (as he then was) recognised that "an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity."

So here, if the appellant had committed no offence of contempt, and had yet pleaded guilty, it is well open for us to intervene and say as much in no uncertain terms. In my view, justice is best served by examining the whole of the record to see if an offence is disclosed on the facts provided to the court. And I think that to serve justice is the paramount duty of us all.

That brings me to the question as to whether the judge had jurisdiction to punish the appellant for contempt in the present case. To answer that question, it is necessary to see the kind of contempt that has been alleged against the appellant. As I said earlier, the substance of the charge against the appellant is that he breached the undertaking to the court not to repeat his earlier libellous statements. The issue therefore is whether a court has jurisdiction to *suo motu* call upon a party to litigation before it to show cause as to why he ought not to be punished for breaching an undertaking he had given in court.

An examination of the authorities reveals that the power of a court suo motu to punish for contempts of itself is confined to cases which are criminal in nature and classified as a "contempt in the face of the court. The leading case on the subject is *Balogh v. St Albans Crown Court* [1975] QB 73, where at p. 83 Lord Denning MR described the jurisdiction:

> In the ordinary way the High Court does not act of its own motion. An application to commit for contempt is usually made by motion either by the Attorney-General or by the party aggrieved: see *Reg. v. Gray* [1900] 2 QB 36; *Attorney-General v. Times Newspapers Ltd.* [1973] QB 710, 737 in this court by me as corrected in the House of Lords [1974] AC 273, at p. 294 by Lord Reid, at p. 310 by Lord Diplock, and at p. 324 by Lord Cross of Chelsea: and such a motion can, in an urgent case, be made *ex parte*: see *Warwick Corporation v. Russell* [1964] 1 WLR 613. All the cases cited in the notes to Ord. 52 r. 5, are of motions by some one *ex parte*. None of them tells us when the High Court can make an order of its own motion. All I find in the books is that the court can act upon its own motion when the contempt is committed 'in the face of the court.' Wilmot CJ in his celebrated opinion in *Rex v. Almon* [1765] Wilm. 243, 254 said: 'It is a necessary incident to every court of justice to fine and imprison for a contempt to the court, acted in the face of it.' *Blackstone in his Commentaries*, 16th ed. (1825), Book IV, p. 286, said: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges.' In *Oswald on Contempt*, 3rd ed. (1910), p. 23 it is said: 'Upon contempt in the face of the court an order for committal was made instanter' and not on motion. But I find nothing to tell us what is meant by 'committed in the face of the court.' It has never been defined. Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man on the spot. So 'contempt in the face of the court' is the same thing as 'contempt which the court can punish of its own motion.' It really means 'contempt in the cognisance of the court.'
>
> Gathering together the experience of the past, then, whatever expression is used, a judge of one of the superior courts or a judge of Assize could always punish summarily of his own motion for contempt of court whenever there was a gross

> interference with the course of justice in a case that was being tried, or about to be tried, or just over – no matter whether the judge saw it with his own eyes or it was reported to him by the officers of the court, or by others – **whenever it was urgent and imperative to act at once**. This power has been inherited by the judges of the High Court and in turn by the judges of the Crown Court. (emphasis added.)

The Master of the Rolls then proceeds to give three modern instances where the *suo motu* jurisdiction has been exercised. He then concludes on the jurisdictional point as follows (at p. 85):

> As I have said, a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it upon himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in RSC, Ord. 52. The reason is so that he should not appear to be both prosecutor and judge: for that is a role which does not become him well.

The second case that I think is of much assistance is *Karam Singh v. Public Prosecutor* [1975] 1 MLJ 229. Although that is a case dealing with the power of a magistrate to commit for contempt, it applies equally to a judge of the High Court. There is a very short judgment in it of Raja Azlan Shah FJ, (as he then was). He is a judge whose views are always held in high regard. I will quote his judgment in full. He said:

> This is an appeal by an advocate and solicitor against summary conviction and sentence of two weeks' imprisonment.
>
> The facts so far disclosed in the record are that there was a heated argument between the magistrate and the learned counsel who was appearing on behalf of a defendant in a case concerning impersonation under section 170 of the Penal Code.
>
> The learned magistrate adjourned into chambers for 15 minutes and after considering the matter returned to the Bench and decided to deal with the appellant summarily. The question here is whether the facts are sufficient to warrant summary committal for contempt.
>
> Insulting behaviour by counsel, however reprehensible, may or may not be contempt depending on the surrounding circumstances. But, in my view, a magistrate's summary power to proceed of his own motion must never be invoked unless the ends of justice really required such drastic means. No doubt it appeared to be rough justice, it is contrary to natural justice and can only be justified if nothing else would do. Therefore this power must be exercised with scrupulous care and only when the case is clear beyond reasonable doubt. In my view, it is only in urgent cases a magistrate should take on himself to move. He should, in my view, leave it to the local Bar Committee to move in

accordance with s. 27 of the Advocates & Solicitors Ordinance 1947. The magistrate should not appear to be both prosecutor and judge – a role which does not become him well.

In my opinion, it was not a case for summary punishment because it was not sufficiently urgent or imperative. He would have done well if he had adjourned the case and reported the matter to the local Bar Committee. The power which a magistrate possesses is both salutary and dangerous. The present appeal gives an opportunity to make clear that it should be used reluctantly but fearlessly when and only when it is necessary to prevent justice from being obstructed or undermined. That is not because judges, witnesses and counsel who are officers of the court, take themselves seriously, but because justice, whose servants we all are, must be taken seriously in a civilised society if the rule of law is to be maintained. Therefore in this case the learned magistrate should have adjourned the matter and reported it to the local Bar Committee, which I propose to do now.

However I would set aside the conviction and sentence.

So it comes to this. The High Court has jurisdiction suo motu to punish for contempts of which it takes cognisance. But the jurisdiction is exercisable only in urgent cases where it is imperative for the court to act at once. Such cases are limited to instances where there is a gross interference with the course of justice in respect of a case that is about to be tried, that is under way or has just been concluded. In all other cases, the court should leave it to a party or to the Attorney-General to institute contempt proceedings in the ordinary way.

To return to the present instance, the appellant's conduct in repudiating the open court statement came on the same day as the statement was read out in court. His repudiation of the open court statement certainly made a mockery of the abject apology that had been tendered in court earlier on the same day. It put the integrity of the open court statement in jeopardy. It was in my view a serious contempt of court. The judge was entitled to know whether he had been misled. But the appellant had not scandalised the court. His repudiatory conduct did not bring the court into odium. It did not lower the court's dignity in any way. It did not immediately threaten the administration of justice. The only people who were directly affected by the appellant's unwise conduct were the plaintiffs in the libel action. They could take the appropriate steps against the appellant. If they were not interested in the matter, then it would be open to the Attorney-General as the guardian of the public interest to take action. It follows that this was not a case that called for summary treatment. There was no urgency for the judge to have moved the contempt on his own motion. Hence I do not consider this to be a case meriting summary disposal. For these reasons, I would hold for the appellant on the first issue.

a **The Second Issue: Was This An Appropriate Case?**

Assuming for a moment that I am wrong in the view I have formed on the first issue, I turn to consider the appropriateness of the learned judge having proceeded *suo motu* on the facts of the present case. As pointed out earlier, the substance of the charge against the appellant was that he had breached his undertaking contained in the open court statement. It is for that reason that a plaintiff in one of the libel actions had commenced contempt proceedings. Even if the judge was entitled to have moved on his own motion against the appellant, he ought, once he was advised of the pending application for leave to apply for committal, to have terminated the proceedings before him on the notice to show cause. He should thereafter have left it to the particular plaintiff to proceed with his action for committal.

The position that obtains in the present case is adequately covered by the judgment of Megarry VC in *Clarke v. Chadburn* [1985] 1 All ER 211, 215:

> It is perhaps not generally realised that where the party who has obtained an order from the court is content that it should not be performed, the court, generally speaking, has no interest in interfering so as to enforce what the litigant does not want enforced. The order is made so as to assist the litigant in obtaining his rights, and he may consult his own interests in deciding whether or not to enforce it. If he decides not to, there may in some cases be a public element involved, and the Attorney General will judge whether the public interest requires him to intervene in order to enforce the order. If neither the litigant nor the Attorney General seeks to enforce the order, the court will act of its own volition in punishing the contempt only in exceptional cases of clear contempts which cannot wait to be dealt with, cases in which, in the words of Lord Denning MR, 'it is urgent and imperative to act immediately' (see *Balogh v. Crown Court at St Albans* [1974] 3 All ER 283 at 288, [1975] QB 73 at 85, where, however, the facts were very different). The present case, I may say, does not seem to me to fall into this category. I should add that I speak only of disobedience to orders, and not, for example, of contempts committed in the face of the court.
>
> Whether this is a satisfactory state of the law is a matter of debate. In cases where (as in this case) there are political overtones, if not more, there are obvious difficulties in requiring it to be the Attorney General who determines whether the public interest requires him to intervene; for however strictly unpolitical a mind he brings to the decision, the opportunities for misrepresentation are almost unlimited. There seems to me to be a clear case for considering whether there should be some relaxation by the courts of their present restraint on themselves in enforcing their orders in cases where these are being openly flouted and the administration of justice is being brought into disrespect. For the courts to say, as they often say, that 'Orders of the court must be obeyed', becomes idle if there are daily instances of open and

> notorious disobedience remaining unpunished. If the courts became more ready to enforce orders of their own motion, no doubt consideration should be given to the machinery by which this might be done. But I have to apply the law as it stands.

In *re M (a Minor)* [1999] 2 WLR 810 is also an authority of some assistance upon the subject under discussion. It was a case where, following the failure of a marriage, the court made an order permitting the father to have contact with his children. Later, the judge reviewed his earlier order and made a further contact order. He endorsed it with a penal notice. Upon a further review, the judge came to the conclusion that the mother had breached the contact order. He issued a notice to the mother to show cause why the penal notice should not be activated. The notice was accompanied with the particulars of breach of the order. The mother then applied to strike out the notice to show cause. She argued that there had been no proper exercise by the judge of his power or discretion and that the matters complained of could not amount to a contempt of court in law. The judge dismissed her application and proposed to hear the committal proceedings himself. The mother's appeal to the Court of Appeal was allowed and the committal application struck out. There is a passage in the judgment of Ward LJ, which is particularly instructive. It appears at p. 823 of the report. After quoting Lord Denning in *Balogh*'s case, the learned Lord Justice proceeds as follows:

> It is usually easier and may often be imperative for the judge himself to deal with any contempt committed in the face of his court, but in civil contempt, where proper opportunity has to be afforded the contemnor to prepare to meet the case against him or her, then ordinarily a judge should not both initiate the committal and thereafter sit in judgment of it. It all too easily gives rise to a real possibility of bias being assumed to shake and so corrupt public confidence in the judgment as explained in *Reg. v. Gough* [1993] AC 646. I hasten to add that I have not the slightest personal doubt that Judge Coningsby QC would have treated this mother with scrupulous fairness. Nevertheless much the wisest example for him to have followed is that of the House of Lords in *In re Lonrho Plc* [1990] 2 AC 154, where one committee of the House of Lords arranged for another to consider the committal lest the party concerned be left a sense of grievance, however misguided. In a court like the Croydon County Court, another judge could always have been found to deal separately with the committal aspect leaving Judge Coningsby Q.C. free to continue to manage the contact where the continuity of his knowledge of the case could have been an important advantage. In my judgment he fell into error when he reserved the adjudication of the committal to himself.

In my view, if the conduct of the defendant in *Clarke v. Chadburn (supra)*, of the mother in *In re M (a Minor) (ibid)*, and of the advocate in *Karam Singh v. Public Prosecutor (supra)*, did not fall within the "urgent and imperative" rule laid down by Lord Denning MR in *Balogh*'s case and by

Raja Azlan Shah FJ in *Karam Singh*'s case, it is difficult, if not impossible, to say with conviction that the facts of the present case do. It follows that given that the court had the necessary jurisdiction and power, the appellant's case was not an appropriate instance for the application of the summary jurisdiction.

For these reasons, I would resolve the second issue also in the appellant's favour.

The Third Issue: Severity Of The Sentence

Mr. Abraham has argued that even if this were a suitable case for the use of the summary power to punish for contempt, the sentence passed by the learned judge is manifestly excessive. Counsel has drawn our attention to the immediate retraction by the appellant of his repudiatory statement. He has also drawn our attention to the abject apology that he tendered to the court at the first available opportunity. The appellant explained in his oral evidence that he did what he did because he wanted the insurers to know of his unhappiness. That, I think, is no answer. If the appellant wanted to vent his frustration at the insurers he had other lawful avenues open to him. What he did was wrong. But, he apologised for it. Not just that. He begged for mercy. It is there in his affidavit. Yet, the judge considered the apology insincere. Counsel for the appellant says that there were no reasonable grounds for so holding. He has argued that there was no judicial appreciation of the apology tendered by the appellant. I agree.

We were referred to several authorities on the point. I do not think that any useful purpose will be served by going through all of them here. For the purposes of the present appeal it is sufficient to quote from only one authority.

In *Dinabandhu Sahu v. State of Orissa* AIR [1972] SC 180, 182, Jaganmohan Reddy J, speaking on behalf of himself and Palekar J, said:

> The apology tendered was not merely an apology but was something more than an apology because what was asked of the Court out of its generosity was forgiveness; that this was sincerely meant is amply demonstrated by its being repeated again before us. We think that the contempt if any has been certainly purged in the manner in which the apology was given and the matter should have been set at rest there. It is no part of the judicial function to be vindictive or allow any personal or other considerations to enter in the discharge of its functions and since both the learned Chief Justice and Misra, J would have been prepared to accept that apology if it was given by the appellants themselves and in writing and since Mr. Chari

> said that the appellants would have been prepared to give such an apology in writing, if that was the only thing that was required and even now are ready and willing to do so we feel that the apology tendered on their behalf by their Senior Advocate can well be accepted and the proceedings closed. We accordingly allow the appeals, set aside the convictions and direct the repayment of the fine, if any, and close the proceedings.

These sentiments, I think, are equally applicable here. The appellant did not merely express his readiness to apologise. As I said, he not only tendered an apology but also did much more. It was quite sufficient to put an end to this unhappy event. Any sentence, whether of fine or imprisonment does not advance the interests of justice. The judge therefore erred in imposing a term of imprisonment of six months. It is manifestly excessive. I can understand the judge's feelings about the whole matter. He thought that a long and complex set of suits had been finally settled. The appellant did not permit that to happen. However, in the light of the abject apology tendered by the appellant the learned judge ought to have put his feelings aside and taken an objective view of the scenario that presented itself to him.

Concluding Remarks

The power to summarily punish a person for contempt is a useful and valuable weapon in the judicial armoury. When properly used, it upholds the course of justice by instilling confidence in the judiciary. But like all powers it is open to misuse. And we must always guard against that event. Otherwise it will produce the exact opposite result. It will erode the confidence of the public in the justice system. The contempt power will hang like a sword of Damocles over the heads of lawyers and litigants. It will destroy freedom of thought and of speech. That is something we must ensure does not happen.

The Result

For the reasons given, I would allow this appeal, quash the conviction and set aside the sentence. The appellant is at present on bail. The order granting bail is, as a matter of consequence, discharged. Because some procedural uncertainty the appellant lodged three appeals. He did so *ex abundanti cautela*. I would make the same order in all three appeals.

Ahmad Fairuz JCA:

I have had the advantage of reading the draft judgment of my learned brother Gopal Sri Ram, JCA. I agree with the facts as related therein. I also agree with my learned brother's view that the appellant had committed a serious contempt of court. I, however, respectfully disagree with the views taken by my learned brother that led him to allow the appeal and to quash the conviction and set aside the sentence.

When dealing with the issue of whether the court had jurisdiction to act, my learned brother referred to the cases of *Balogh v. St. Albans Crown Court* [1975] QB 73 and *Karam Singh v. Public Prosecutor* [1975] 1 MLJ 229. In *Balogh*'s case, Mr. Stephen Balogh, while attending a criminal trial at a Crown Court, devised a plan to release laughing gas down a ventilation duct on the roof into the trial court. He then stole a cylinder of the gas from a hospital lorry and kept it in his brief case. He climbed up on to the roof of the courthouse at night to locate the particular inlet duct. This was, unknown to the appellant, noticed by the police. The next morning he left his briefcase containing the cylinder in the public gallery of the court adjoining (court 1) the trial court. The police found the briefcase and opened it. Mr. Balogh, after having been cautioned by the police, admitted what he had done and planned to do. Mr. Balogh was then charged with theft of the cylinder. The police then reported the matter to Melford Stevenson J, the senior judge, who was presiding in court 1. Mr. Balogh was brought before the judge who said that his admitted conduct was a serious contempt of court and that he would consider the penalty overnight. Mr. Balogh was then kept in custody and was brought before the judge the next morning. The judge did not deal with the theft charge but proceeded to commit Mr. Balogh to six months' imprisonment for contempt of court.

In *Karam Singh*'s case the appellant was counsel for the defendant who was charged under s. 170 of the Penal Code. During the trial, the appellant entered into a heated argument with the presiding magistrate. After adjourning the case for about 15 minutes, the magistrate returned to the bench and decided to deal with the appellant summarily.

In both cases the alleged contempt offences were dealt with almost immediately after the alleged offences were committed. In the appeal now before this court, the alleged contempt by the appellant was taken cognisance of by the High Court some nine days after the alleged offence was committed. The relevant newspapers carried the settlement statement and the appellant's press statement on 22 October 1998. Only on 31

October 1998 the High Court issued the notice to the appellant to appear before the High Court to show cause as to why he should not be punished for contempt of court. Hence, the High Court's action here, was not as immediate as that taken by the judges in *Balogh*'s and *Karam Singh*'s cases. At this juncture, I would like to refer to the case of *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd. & Ors.* [1986] 2 CLJ 109 wherein Mohamed Azmi SCJ, said:

> When the contempt is not committed in the face of the Court, as is the case alleged here, **it is equally important that the dignity and integrity of the Court be protected and preserved, and in such cases the contempt proceedings may be initiated** by motion either by the Attorney-General or any private party who has sufficient interest in the matter, or **even by the Court itself,** although in practice it seems unjust to expect the Court to protect itself by being both complainant and judge, **save in the unlikely event of the Attorney-General or the appropriate private party declining to act.** (emphasis added.)

In the appeal now before this court, the High Court waited from 22 October 1998 until 31 October 1998. Neither the Attorney-General nor the relevant party with sufficient interest in the matter took any steps to bring committal proceedings against the appellant. Under such circumstances I am of the view that the High Court had taken the right step in issuing the notice to show cause. In this connection, I would refer to *Balogh*'s case, wherein at p. 89, Stephenson LJ said:

> Contempts, however, are not confined to contemptuous or offensive words or conduct or to the disturbance of court hearings, nor are those the only contempts which attract the **summary remedy**. I do not accept the argument that the limits of the power of a superior court to imprison a contemnor are defined or restricted by the Rules of the Supreme Court. They should disclose but may disguise its true nature and extent, and if they misunderstand it they may need to be revised. The question is not what the rules of procedure which regulate it say or imply that it is but what it really is. I am satisfied that it is not limited to contempt in the face of the court, on any permissible understanding of those words, **but has long extended** not only to disobedience to orders of the court and **breaches of undertakings to the court** but also to interference with the administration of justice which satisfy two conditions: (1) that the contempt is clearly proved beyond a reasonable doubt, and (2) that it affects or is intended to affect the course or outcome of judicial proceedings in being – that is, in the words of Lord Diplock in *Attorney-General v. Times Newspapers Ltd.* [1974] AC 273, 308 "actually proceeding or ... known to be imminent" – unless immediately stopped by the apprehension and, if necessary, the detention of the offender. (emphasis added.)

In *Attorney-General v. Butterworth & 6 Others* [1963] 1 QB 696, Lord Denning MR, at p. 722, said:

> I think the short answer to this contention is that **contempt of court is** a criminal offence, **punishable summarily by the court itself,** and, like all criminal offences, it requires in general a guilty mind. (emphasis added.)

It is evident therefore that the summary remedy is available in cases of breaches of undertakings to the court. To add to the case laws abovementioned is O. 52 r. 4 of the Rules of the High Court 1980 which clearly empowers the High Court to act of its own motion. Order 52 r. 4 reads:

> Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the High Court to make an order of committal of its own motion against a person guilty of contempt of Court.

Still on the issue of summary power, Stephenson LJ, in *Balogh*'s case, at p. 91, said:

> The power which the judge exercised is both salutary and dangerous: salutary because it gives those who administer justice the protection necessary to secure justice for the public, dangerous because it deprives a citizen of the protection of **safeguards** considered generally necessary **to secure justice for him**. This appeal gives an opportunity to make clear that it is **a power to be used** reluctantly but fearlessly when, and only **when, it is necessary to prevent justice being** obstructed or **undermined** – even by a practical joker. (emphasis added.)

As to "safeguards considered generally necessary to secure justice for" the contemnor, I am reminded of the case of *Coward v. Stapleton* (90) CLR 573 wherein at pp. 579 and 580, the High Court of Australia said:

> Even apart from any such express provision, however, it is **a well-recognized principle of law** that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering is given to him: *In re Pollard; R. v. Foster; Exparte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kin v. Piggott*. The **charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard** in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment. (emphasis added).

Needless to say, the records of the High Court show that the learned High Court judge had complied with the aforequoted passage of the judgment in *Coward*'s case *(supra)*. The appellant, in fact, had the benefit of counsel. At the hearing of the committal proceeding the appellant's counsel said:

> My client's instructions are not to oppose the Notice to Show Cause but to offer an explanation and for me to mitigate.

I realise that both *Balogh*'s and *Karam Singh*'s cases, as stated by my learned brother in his draft judgment, laid down the "urgent and imperative" rule before the summary power can be exercised. But in the circumstances of the present appeal, that is the only missing circumstance. The question therefore is – what injustice has been done when such circumstance does not exist when other principles of natural justice in particular had been complied with by the learned judge? How is the appellant prejudiced just because the case is not urgent and imperative? The appellant admitted committing contempt of court. He had pleaded guilty. And just because the learned High Court judge had exercised summary power when the circumstances were not urgent and imperative to do so, the appellant should be acquitted? And the facts show beyond reasonable doubt that he had committed the contempt offence. I cannot see how the appellant can suffer any injustice in the circumstances found in the present appeal before us just because the "urgent and imperative rule" had not been complied with by the learned judge.

To quash his conviction merely on the ground that the High Court should have left the matter to be taken up by the Attorney-General or the relevant parties in the dispute would in my view be an injustice. It is injustice to allow a person, who not only had pleaded guilty to the charge preferred against him but had clearly committed the contempt of court offence beyond reasonable doubt, to be acquitted. After all, the learned Raja Azlan Shah FCJ, in the *Karam Singh*'s case *(supra)* had said (at p. 229):

> Therefore this power must be exercised with scrupulous care and only when the case is clear beyond reasonable doubt.

To acquit the appellant on a mere procedural error (if at all it can be considered as one) by the High Court, would, in my view, be not paying any heed to what Lord Collins M.R. said in *Re Coles and Ravenshear* [1907] 1 KB 1, 4, which reads:

> Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

To me, to acquit the appellant because the High Court had taken upon itself to commit the appellant for contempt and not the Attorney-General or the relevant parties to the dispute, would mean that one is being academic, procedural and technical about the whole matter. On this, I would refer to the following passage from the judgment of Kaikaus J in *Imtiaz Ahmad v. Ghulam Ali PLD* [1963] SC 382 at 400:

> The English system of administration of justice on which our own is based, may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the **substance** defeats **substantive rights** is defective to that extent. The ideal must always be a system that gives to every person what is his. (emphasis added.)

In the circumstances of this appeal, I would adopt what my learned brother had said in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283 at p. 293 ie:

> ... After all, courts exist to do justice according to the law as applied to the **substantial merits** of a particular case ... (emphasis added.)

It is to be noted that *Karam Singh*'s case is a High Court decision and therefore not binding on this court. *Balogh*'s case is an English case decided in 1974. It is therefore not the common law as administered on 7 April 1956. (*Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65). I am not aware of any Supreme Court or Federal Court decisions that follow *Balogh*'s case on the issue of the "urgent and imperative rule". As such, the case remains of persuasive authority only. Anyway, the Court of Appeal in *Balogh*'s case had allowed the appeal because the court was of the view that Mr. Balogh was not guilty of contempt. In the appeal now before this court the appellant is guilty of contempt. Who is more affected by the contempt if not a court. Any contempt would involve the dignity and integrity of the court which must be protected and preserved. It is therefore right, in my view, for the High Court to proceed with the committal proceedings. Furthermore nine days had passed. And could not that be an indication of the Attorney-General or the party with sufficient interest in the matter declining to act? (*Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd. & Ors. (supra)*). Even if the party interested had started the committal proceedings and the learned judge had later come to know of such proceedings, I am of the view that there cannot be any injustice in the learned judge continuing with his proceedings for so long as the principles like that laid down in *Coward*'s case *(supra)* are observed. For the learned judge to terminate his proceedings and allow the party to proceed with its applications, would, in my view, be manifestly an indulgence in procedural technicality.

For the reasons stated above, I would dismiss the appeal against the conviction.

As regards the sentence of six months' imprisonment imposed by the High Court, I associate myself with the sentence imposed by my learned brother Denis Ong Jiew Fook, JCA and the reasons put forth by him in his judgment. Consequently I allow the appellant's appeal against sentence to the extent stated in my learned brother Denis Ong Jiew Fook's judgment.

As there are three appeals before this court, I would make the same orders in all the three appeals, that is to say – appeal against conviction is dismissed and appeal against sentence is allowed to the extent that the sentence of six months' imprisonment is substituted with a fine of RM10,000 and in default of payment three months' imprisonment.

Denis Ong JCA:

I have had the advantage of reading the main judgment in draft of my learned brother Gopal Sri Ram JCA and the dissenting judgment also in draft of my learned brother Ahmad Fairuz JCA.

The facts of the case and the sequence of events which prompted the High Court *suo motu* to commit the appellant to prison upon a notice to show cause have been outlined in the main judgment. I will not repeat them here.

The appellant was found guilty of contempt and was sentenced to six months' imprisonment. Against such finding and sentence, he appealed to this court.

Apart from the matter of whether to allow the Bar Council to hold a watching brief (which does not concern this appeal), the first question which the High Court and this court have to determine was whether there was contempt of court committed by the appellant.

The stand taken expressly by the appellant in the High Court was not to oppose the notice but to offer an explanation in mitigation of the sentence. In the result, it found the appellant guilty of the offence of issuing a press statement in breach of a court order after he had authorised the reading of a statement in open court by his counsel.

Grounds 3 and 2 of his memorandum of appeal bore upon the finding of guilt. There were two points argued before us. The first concerned the effect of the press statement issued by the appellant himself to the publishers of three separate newspapers namely The Star, The Sin Chew Jit Poh and The Nanyang Siang Pau on the evening of the same day (ie, Thursday 22 October 1998) as the open court statement was read out by his former counsel Mr. Christopher Foo. Mr. Cecil Abraham of learned counsel for the appellant in his stand indicated to us on 19 July 1999

agreed that the effect of that press statement was to set at nought the sincerity of the apology of the appellant in the open court statement and to put the latter statement in issue. He dwelt no more on this point. I agree for the reasons given in the main judgment that there was a serious contempt committed and that the High Court was entitled to know whether it had been misled.

There was some argument before us on a point of law about whether the High Court had summary jurisdiction or power to issue the notice to show cause. The argument stemmed from the fact that there was a break in time when the open court statement was read out at the conclusion of the settlement proceeding and the faxing of the press statement that same evening. Dato' Sivaparanjothi of learned counsel for the 1st and 2nd respondents maintained that there was jurisdiction because the publication of the press statement that same evening reinstated the original allegations for which the first apology in the open court statement was made. In his reply and in answer to a question by my learned brother Ahmad Fairuz JCA, Mr. Abraham agreed that there was such jurisdiction.

As to the summary powers of the High Court to punish for contempt there can be no doubt to my mind that it has, in the light of the saving provisions of O. 52 r. 4 of the Rules of the High Court 1980 which my learned brother Ahmad Fairuz JCA pointed out in his judgment. Order 52 r. 4 reads as follows:

> Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the High Court to make an order of committal of its own motion against a person guilty of contempt of court.

Order 52 r. 4 of the English Rules of the Supreme Court 1965 corresponds to our O. 52 r. 4 and the notes thereto in [1979] 1 *Supreme Court Practice* at para 52/51/1 read thus:

> Effect of the rule – It is taken from the former O. 44 r. 2(2), but that rule ran "to make an immediate order of committal against a person guilty of contempt in the face of the court." The present rule covers such cases and any other case (such as disobedience to an order made in wardship proceedings) where the court may think it necessary to commit of its own motion (see eg, *R v. Gray* [1900] 2 QB 36; *Bernstein v. Bernstein* [1960] Ch. 128; *Hipgrave v. Hipgrave* [1962] P 91; *Warwich Corporation v. Russell* [1964] 1 WLR 613). The [1962]; *Warwich Corporation v. Russell* [1964] 1 WLR 613). The court can also of its own motion issue a subpoena to ascertain the facts (*Yianni v. Yianni* [1966] 1 WLR 120).

The second point raised by the submissions of both sides was whether the High Court was right to have issued the notice *suo motu* in the particular circumstances of this case: see *Borrie & Lowe – The Law of Contempt* 3rd edn, pp. 502-503 for a discussion of the circumstances when a court should act upon its own motion. This is a point of law not taken in the High Court; nonetheless we allowed it to be argued before us.

Dato' Sivaparanjothi submitted that the High Court was right because it was criminal contempt in the nature of:

(a) scandalising the court and undermining public confidence in our courts and the Malaysian judiciary; and

(b) a breach by the appellant of his undertaking that he would not repeat or publish the said or similar words attributed to him in the article and that the settlement was forced upon him by the court.

Mr. Abraham submitted that the High Court was wrong because:

(a) this was not a case of scandalising the court. It was a case of a breach of a court order or undertaking, was a civil contempt – not a criminal contempt. As such it was open to the 1st and 2nd respondents to apply for committal of the appellant to enforce the order or undertaking or for the High Court to refer the matter to the Federal Attorney General; and,

(b) the judge should have recused himself from hearing the matter after issuing the notice to show cause.

Vis-a-vis the charge in Lampiran "A" (annexure "A") to the notice to show cause and with respect I disagree with Dato' Sivaparanjothi and agree with Mr. Abraham that this is not a case of scandalising the court. Upon a perusal of annexure "A", I find nothing whatever in the charge which alleges or suggests the offence of scandalising the court. On the other hand, it is abundantly clear to me that the charge of contempt therein specified, is solely for breach by the appellant of his undertaking in the open court statement. That undertaking is also embodied in the court order. Thus I agree with both learned counsel that this was a case of a breach by the appellant of his undertaking.

Whether such a breach constitutes criminal contempt or civil contempt is a point of law and on this point, I am of the same mind as Ahmad Fairuz JCA that the breach in question was criminal contempt on the authorities which he cited in his judgment (see also on this point *Witham v. Holloway* 131 ALR 401 at p. 405. *ll* 5-10 per Brennan J etc). It is also clear from

the judgment of our former Supreme Court in *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* [1986] 2 CLJ 109 also cited by him and binding upon the Court of Appeal that our courts recognise that contempt may be committed in the face of the court as well as outside the court and that in those situations it is equally important that the dignity and integrity of the court be protected and preserved (see also on this point, *Solicitor-General v. Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at p. 229. *ll* 27-35 per Richmond P). The breach in question in our present case took place after the conclusion of the settlement proceedings by the act and conduct of the appellant in faxing and publishing a press statement to the media which had the effect of undermining public confidence in the dignity and integrity of the High Court. Thus the contempt committed was not in the face of the court during the proceeding (which if it were so, would be dealt with summarily on the spot) but was committed outside the court. In the latter situation it is also required to deal with the contempt urgently by way of summary procedure in the form of motion by the private party, the Attorney General or the court so that the true position be made publicly known and that any mischief caused by the press statement should be promptly remedied so far as is possible. Lack of urgency is however no more than a factor which should weigh with the court and it is not possible to lay down any hard and fast rule: *Radio Avon* at p. 236 *ll* 31-52. In that case there was a time lapse of two months after the news item was broadcast before the Solicitor-General commenced by motion to commit Radio Avon for contempt and some four months from the broadcast before the motion was heard. The New Zealand Court of Appeal reasoned that if the Supreme Court had refused to deal with the matter summarily, there would have been yet further delays and as it was, Radio Avon had ample opportunity to prepare and present their defence. On those grounds, it was thought that the New Zealand Supreme Court was justified in dealing with the matter in a summary way. In our present case, the faxing to the media of the press statement took place at 5pm on 21 October 1998 and was published on 22 October 1998. No contempt proceeding was initiated by the Federal Attorney General or by the 1st and 2nd respondents. On 31 October 1998, nine days after 22 October 1998, the High Court issued the notice to show cause which was heard on 30 November 1998 ie, 39 days after publication to the media. In my view, there was no delay by the High Court to deal with the contempt summarily as a matter of urgency making reasonable allowance for the Attorney General or the respondents to take the initiative. Further, the appellant was given the whole of November 1998 to prepare and present his defence. This court was informed by Dato' Sivaparanjothi in the course of the hearing that leave was granted by the High Court to the respondents in late November 1998 to issue committal proceeding against the appellant but no further action was taken. If the

High Court had waited on the respondents to proceed with the committal, this would surely have resulted in further delays. However, this was not a point taken by Mr. Abraham.

The point taken at the hearing before us was that the High Court judge should have recused himself after issuing the notice to show cause or to cease to hear after realising that the respondents had moved by motion. It is a fact that in the High Court, no application was made to the judge to recuse himself or objection raised that he should cease to hear the notice after the respondents were granted leave. Consequently, there was no argument heard or a determination made by the High Court judge on the recusal point. The stand taken by the appellant in the High Court was not to oppose the notice but to offer an explanation in mitigation of the sentence. With respect, the appellant is himself a practising advocate and solicitor of the High Court in Malaya. He was also represented in the High Court by Mr. Abraham. If that was the stand taken in the High Court so be it and I do not think it is proper for him to alter that stand before us after it was acted upon by the High Court judge and the other parties to the proceedings. There are two ways of looking at the High Court judge continuing with the hearing of the notice: one is from the inside ie, from the perspective of the judiciary (see eg, *Karam Singh Veriah v. Karpal Singh* [1987] 1 CLJ 63) and the other is from the outside ie, from the perspective of the community and there are arguments for and against his continuation: see Commentary on *R v. Hill* [1986] Crim. LR 457 at p. 458.

For these reasons I hold that the High Court was right to have issued the notice *suo motu* in the particular circumstances of this case and for the same judge to continue to hear the committal proceeding to its conclusion. And so I uphold the conviction of the appellant by the High Court.

The second question to consider is the sentence of six months' imprisonment imposed on the appellant by the High Court which the appellant complained in ground 1 of his memorandum of appeal as manifestly excessive and that the High Court did not attach sufficient weight to his oral evidence and also the fact that he apologised three times to the court. The 1st and 2nd respondents submitted that the sentence of six months' imprisonment was fair and cited *Lee Lim Huat v. Yusuf Khan bin Ghows Khan & Anor* [1997] 3 CLJ 197 (CA) in support.

With respect, *Lee Lim Huat* is not on all fours with the facts of the present case. It is true that in that case as in the present one, the contemnor is a member of the Bar and that whether it is a breach of an undertaking given to the High Court here or a breach of an injunction order there, is inconsequential as an undertaking has the same force as an injunction.

However, it will be observed that the contemnor there was twice convicted and sentenced separately. For his first conviction, he was sentenced to a fine only; for his second conviction he was sentenced to six months' imprisonment. In the present case, the conviction of the appellant for contempt is his sole conviction.

It is a fact that the appellant retracted his press statement which was published the next day. It is also a fact that he pleaded guilty to the charge in the sense he did not oppose the notice to show cause and chose only to mitigate on sentence. Lastly, he did in fact repeatedly apologise to the High Court and pleaded for mercy.

On the other hand, this is, as I said before, a case of contempt committed outside the court *via* the media which had undermined the dignity and integrity of the court.

Taking all factors into consideration, I am of the opinion and I so hold that an appropriate and fair sentence in the circumstances of the three cases would be a fine of RM10,000. Consequently, I set aside the sentence of six months' imprisonment and substitute therefor a fine of RM10,000, in default of payment three months' imprisonment.

Hence I dismiss the appeal against conviction and allow the appeal against sentence to the extent indicated above in all three appeals.